

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER 99-0300 CSET  
CONTROLLED SUBSTANCE EXCISE TAX  
FOR TAX PERIOD: April 19, 1999**

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**ISSUE**

**I. Controlled Substance Excise Tax – Imposition**

**Authority:** IC 6-7-3-5; IC 6-7-3-6; IC 6-8.1-5-1; IC 35-48-4-13; *Clift v. Indiana Department of State Revenue*, 660 N.E.2d 310 (Ind. 1995) and *Bryant v. State of Indiana*, 660 N.E.2d 290 (Ind. 1995).

Taxpayer protests the imposition of the Controlled Substance Excise Tax.

**STATEMENT OF FACTS**

Following a search conducted pursuant to a search warrant, Taxpayer was arrested in May, 1997, by officers from various police agencies and charged with a number of offenses, including dealing cocaine, conspiracy to deal cocaine, possession of cocaine, dealing in marijuana, possession of marijuana, dealing hashish, possession of hashish, maintaining a common nuisance, corrupt business influence, possession of a machine gun, and possession of a fully automated firearm while dealing in a controlled substance. The Indiana Court of Appeals eventually found the search to be illegal and suppressed evidence discovered during the search. On January 20, 1999, the Washington Superior Court accepted a plea agreement between the Taxpayer and the local prosecutor. As part of the plea agreement, the Taxpayer pled guilty to maintaining a common nuisance and forfeited all money and property seized at the time of Taxpayer's arrest. The State agreed to drop all other charges and to seek no further fines or forfeitures. The Department assessed the controlled substances excise tax on April 19, 1999. The assessment was based on 913.68 grams of cocaine and/or liquid morphine, 22 morphine tablets, 212 Schedule IV tablets, and 106,333.66 grams of marijuana. Taxpayer protested the assessment. Additional relevant information will be provided below as necessary.

## DISCUSSION

### **I. Controlled Substance Excise Tax – Imposition**

IC 6-7-3-5 states: “The controlled substance excise tax is imposed on controlled substances that are: (1) delivered; (2) possessed; or (3) manufactured; in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.”

IC 6-8.1-5-1(b) states: “The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.”

Taxpayer first argues his plea agreement with the State of Indiana precludes the Department of Revenue from issuing an assessment in this instance because “[n]either party may add to the agreement, and the state may not impose any additional punishment not specifically set forth in the agreement. Additional punishment includes fines and forfeiture of property that were not specified in the plea agreement” [Taxpayer’s Hearing Brief, page 2, citations omitted.] A plea agreement, however, only covers the pending criminal matters facing the Taxpayer. A local prosecutor has no statutory or other legal authority to enter into an agreement waiving the imposition of taxes. Likewise a superior or circuit court has no statutory or other legal authority to accept such an agreement. Contrary to Taxpayer’s argument, the imposition of the Controlled Substance Excise Tax is not a fine or forfeiture and is therefore not barred by the plea agreement between the Taxpayer and the State of Indiana. Nothing in the plea agreement, either specifically or implicitly, prohibited the prosecutor in this case from referring the matter to the Department of Revenue.

Taxpayer next argues that the imposition of the Controlled Substance Excise Tax constitutes double jeopardy because the Taxpayer has already pled guilty to a charge of maintaining a common nuisance as a result of the search conducted on his residence. As the Indiana Supreme Court noted in *Bryant v. State of Indiana*, “Where the same act or transaction constitutes a violation of two distinct statutory provisions, ‘the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. If each statute requires proof of an additional fact which the other does not,’ the offenses are not the ‘same offense’ for double jeopardy purposes.” (290 N.E.2d at 298.) While *Bryant* holds the imposition of the Controlled Substance Excise Tax is a jeopardy for double jeopardy purposes, Taxpayer in this case pled guilty to the charge of maintaining a common nuisance under IC 35-48-4-13. The elements necessary for a conviction under IC 35-48-4-13 are distinctly different from the elements necessary to prove an assessment under IC 6-7-3-5.

Thus, the imposition of the Controlled Substance Excise Tax does not constitute double jeopardy for the Taxpayer in this instance.

Finally, taxpayer argues the jeopardy assessment is invalid because it “resulted from the illegal conduct of state law enforcement officers in the search of his residence. The Indiana Court of Appeals found that the State did not have probable cause to search the residence...” [Taxpayer’s Hearing Brief, pages 3-4.] As the taxpayer acknowledges in his brief, however, the exclusionary rule is applicable only in criminal cases. Since the imposition of the Controlled Substance Excise Tax is considered a civil action in Indiana, the Court of Appeals decision prohibiting the use of the evidence found as a result of an invalid search warrant applies only to criminal proceedings and not to civil matters such as this.

### **FINDING**

Taxpayer’s protest is respectfully denied.